STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

FutureGen Industrial Alliance, Inc.	:	
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Application for a Certificate Authorizing the Construction and Operation of a Carbon Dioxide Pipeline.	:	13-0252

REPLY BRIEF ON EXCEPTIONS OF THE STAFF OF THE ILLINOIS COMMERCE COMMISISON

The Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, and pursuant to Section 200.800 of the Illinois Commerce Commission's Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Reply Brief on Exceptions to the Proposed Order, filed on e-Docket on January 3, 2014, in the above-captioned matter.

I. Discussion

The FutureGen Industrial Alliance, Inc. ("FutureGen" or "Company") makes three general arguments against the Administrative Law Judge's ("ALJ") Proposed Order ("PO"), most of which FutureGen has advanced previously and all of which were properly rejected in the PO and should be ignored by the Commission, as Staff will explain further below. First, FutureGen argues that the PO contravenes the plain meaning of the Illinois Carbon Dioxide Transportation and Sequestration Act (220 ILCS 75/1 et seq.) ("CO_2 Act"). (FutureGen BOE at 3-9.) Second, FutureGen alleges that the PO is "in direct conflict with the legislative history of the [CO_2] Act." *Id.* at 3, 9-11. Third, FutureGen argues the PO's interpretation of the CO_2 Act would lead to "impractical and

unworkable results." *Id.* at 11-16. Finally, FutureGen argues that the PO misstated its position[1]. *Id.* at 3.

A. <u>The PO Conclusion is Supported by the Planning Meaning of the CO_2 Act</u>

First, FutureGen is correct that the Commission should consider the plain meaning of the CO_2 Act as a threshold issue. The primary rule of statutory construction is to give effect to the legislature's intent in enacting the statute. (*Bruso by Bruso v. Alexian Brothers Hospital*, 178 Ill. 2d 445, 451 (1997).) Legislative intent should be sought primarily from the language of the statute, (*People v. Beam*, 55 Ill. App. 3d 943, 946; 370 N.E. 2d 857 (5th Dist. 1977)), since the language of the statute is the best evidence of legislative intent (*Bruso*, 178 Ill. 2d at 451) and provides the best means of deciphering it. (*Matsuda*, 178 Ill. 2d at 365.) Statutes must be construed as a whole, and the court or tribunal must consider each part or section in connection with the remainder of the statute. (*Bruso* at 451-52.) If the legislature's intent can be determined from the plain language of the statute, that intent must be given effect, without further resort to other aids to statutory construction. (*Id.* at 452.) Thus, the threshold task for a court or tribunal in construing a statute is to examine the terms of the statute. (*Toys "R" Us v. Adelman*, 215 Ill. App. 3d 561, 568; 574 N.E. 2d 1328 (3rd Dist. 1991).) Importantly, the ALJ's PO is supported by the plain meaning of the CO_2 Act, and it is FutureGen's position that is contrary to the plain meaning.

FutureGen argues that the CO_2 Act "contemplates that the Commission will issue a final order 'granting a certificate of authority' ***before*** an applicant obtains 'all required

[1] Staff believes FutureGen makes this argument in relation to its interpretation of the plain meaning of the statute, as it is the only argument Staff could identify alleging the PO "misstated" FutureGen's opinion. *See* FutureGen BOE at 7 ("The FutureGen Alliance does not, and did not previously, assert that a Final Order issued by the Commission approving a Certificate of Authority for a CO_2 pipeline will have no effect.").

permits or approvals' from other agencies." (FutureGen BOE at 4 (emphasis in original).) The CO_2 Act states:

> A final order of the Commission granting a certificate of authority pursuant to this Act shall be conditioned upon the applicant obtaining all required permits or approvals . . . necessary for the construction and operation of the pipeline prior to the start of any construction.

220 ILCS 75/20(g). The General Assembly contemplated that the certificate of authority would not take force and be effective until after the applicant obtained all required permits and approvals. *See* 220 ILCS 75/1 et seq. This is clear from two separate sections of the CO_2 Act.

First, Section 20(g) states, in relevant part, that the "granting of a certificate of authority pursuant to this Act shall be conditioned upon the applicant obtaining all required permits or approvals." 220 ILCS 75/20(g). The plain meaning of this section is clear: the granting of the certificate is conditioned upon the applicant obtaining all required permits or approvals. (*See* PO at 16.) FutureGen interprets the CO_2 Act language that the "Commission's '**granting** of a certificate' must 'be conditioned upon' the applicant obtaining all the permits and approvals 'prior to the state of any construction'" in a manner that would allow the Commission to grant a a Certificate that an applicant could exercise before it obtained "all required permits or approvals." (FutureGen BOE at 4.) This ignores the very plain meaning of the statute and the General Assembly's clear requirement that the certificate be conditioned upon obtaining all such permits and approvals. If the General Assembly had intended that any applicant for a certificate of authority could exercise the powers associated with a certificate without obtaining all required permits or approvals, it could have chosen its words to indicate that. However, the General Assembly chose not to do so; as the PO correctly

states, the conditions are attached to the Final Order itself, and according are attached to the certificate of authority and the grant of eminent domain authority as well. (PO at 16-17); *see* 220 ILCS 75/20(g).

Second, Section 20(b) grants the Commission the authority to grant a certificate of authority pursuant to the CO_2 Act "if it makes a specific written finding as to each of the following . . . (7) the applicant possesses the financial, managerial, legal, and technical qualifications necessary to construct and operate the proposed pipeline." 220 ILCS 75/20(b). In other words, the Commission's authority to grant a certificate is only to be exercised if the applicant has, among other things, demonstrated it possesses the legal qualifications necessary to *construct* and *operate* the proposed pipeline. *Id.* The legal qualifications necessary to construct and operate the proposed pipeline include the required permits and approvals to do so.

It appears the General Assembly recognized that the Commission process, limited to eleven months from the date of filing, may be faster than the application process for some or all of the other required permits and approvals; thus it appears that the General Assembly allowed the Commission to issue a final order that would grant a certificate of authority that would take force and become effective upon the applicant obtaining all required permits and approvals. *See* 220 ILCS 75/1 et seq. Contrary to FutureGen's assertions, this allows the Commission to make a final decision on those aspects of the application for a certificate of authority over which the Commission has ultimate decision-making authority (i.e., technical, financial and managerial resources and abilities) before the applicant has obtained all required permits and approvals. (*See* FutureGen IB at 5-6.) Under the PO, the Commission may not issue a certificate of

authority until, but may decide it will issue a certificate of authority upon, the date the successful applicant fulfills all the qualifications required by the CO_2 Act, including obtaining all the required permits and approvals.

This is true, FutureGen's attempts to bolster its argument notwithstanding. FutureGen argues that "[i]f the certificate could not be issued or take force and effect until such permits and approvals were in hand, there would be no need for the order to contain such a prohibition [that the "final order must specifically prohibit the state of any construction until all such permits and approvals have been obtained"] because the [CO_2] Act already prohibits construction of a carbon dioxide pipeline without a certificate of authority." (FutureGen BOE at 5.) However, Section 20(g) sets out the requirements applicable to the Commission's Final Order. 220 ILCS 75/20(g).

Moreover, Section 20(g) sets out <u>two separate</u> requirements: (1) the Commission's final order granting a certificate of authority must be conditioned upon the applicant obtaining all required permits and approvals necessary for construction and operation; and (2) the Commission's final order must specifically prohibit the start of any construction until all such permits and approvals have been obtained. *Id.* FutureGen's interpretation renders meaningless at least one of those sentences; if a sentence merely "confirms" the previous sentence, it is superfluous: it is more than what is necessary. This is contrary to well-established rules of statutory construction, which require that statutes be interpreted and applied in such a way that no word, clause or sentence is rendered superfluous or meaningless. (Kozak v. Firemen's Retirement Bd., 95 Ill. 2d 211, 216; 447 N.E.2d 394, 397 (1983))

Section 20(a), which FutureGen relies upon for the crux of this argument, sets out requirements applicable to *entities* hoping to (1) construct; (2) operate; or (3) repair a carbon dioxide pipeline in Illinois. 220 ILCS 75/20(a) (prohibits the construction, operation, and repair of a carbon dioxide pipeline without a certificate). These two sections set out completely different requirements: one for the Commission's final order and the other on the entities themselves, and the PO is consistent with this reading.

Next, FutureGen argues that the PO imposes a condition precedent "even though the [CO_2] Act lacks language imposing such a requirement." (FutureGen BOE at 5.) However, this ignores the plain meaning of Section 20(b) of the CO_2 Act, which states in relevant part, that the Commission may not issue a certificate of authority only after making a specific written finding that "(7) the applicant possesses the . . . legal and technical qualifications necessary to construct and operate the proposed carbon dioxide pipeline." 220 ILCS 75/20(b). Even FutureGen notes that in this Section, the General Assembly is imposing a series of "conditions" that must be met before the Commission may issue a certificate of authority. (FutureGen BOE at 4, fn 2.) These are conditions precedent imposed by the General Assembly in the CO_2 Act that cannot be interpreted away.

Third, FutureGen argues the PO "leads to an illogical result because it renders the word 'granting' in Section 20(g) superfluous or meaningless." (FutureGen BOE at 6.) However, FutureGen seems to ignore that its interpretation would render the majority of Section 20(g), and indeed the entire CO_2 Act, meaningless if it were accepted. FutureGen's interpretation is unreasonable, as it would allow any applicant to obtain a certificate of authority from the Commission after merely *applying* for it despite not

having met all the requirements, including all required permits and approvals, to obtain the certificate. (*See, generally,* FutureGen BOE.) This would render the Commission certification process, the certificate of authority itself, and, indeed, the entire CO_2 Act meaningless. “Where the language of a statute admits of two constructions, one of which would make the enactment absurd and illogical, while the other renders it reasonable and sensible, the construction which leads to an absurd result must be avoided.” (*Mulligan v. Joliet Regional Port District*, 527 N.E.2d 1264, 1269 (1988).) Therefore, FutureGen’s absurd and illogical interpretation should be ignored, and the interpretation of the PO should be affirmed.

Fourth, FutureGen argues that the PO is incorrect that “[t]he Applicant argues that it is the Final Order, not the Certificate that is conditioned on the receipt of all required permits.” (FutureGen BOE at 7 (*citing* PO at 16).) Staff will not address this argument substantively, but will note that FutureGen argued “[t]he language in Section 20(g) ‘shall be conditioned upon’ clearly modifies the reference to the ‘final order’” in its Amended Brief to Explain Disputed Language in Partial Draft Joint Proposed Order. (FutureGen Amended Brief 3.)

Fifth, FutureGen argues that the PO leads to an illogical result because it “ignores the specific reference to ‘construction’ in both sentences of Section 20(g).” (FutureGen BOE at 7.) FutureGen argues the word “construction” limits the scope of Section 20(g) requirement that the final order be conditioned upon the applicant obtaining all permits or approvals. Again, FutureGen is mistaken. As discussed above, Section 20(g) sets out the limitations on the Commission’s issuance of a final order under the CO_2 Act. The first sentence of Section 20(g) requires the final order granting a

certificate of authority be conditioned upon the applicant obtaining all required permits or approvals, including permits and approvals required for construction. The second sentence requires the Commission to specifically prohibit the start of construction until after an applicant has obtained all required permits and approvals. The mention of the word "construction" twice is mere happenstance related to the actual purpose behind the Section.

Sixth, FutureGen argues that Section (i) further illustrates that the PO would lead to illogical results because "[u]nlike the authority to construct, . . . where the General Assembly specifically imposed conditions, the Act ***imposes no conditions*** on the limited grant of authority to obtain an easement." (FutureGen BOE at 8 (emphasis original).) However, this is itself illogical. FutureGen essentially argues that while the General Assembly required an applicant to meet certain minimum standards regarding its ability to construct a CO_2 pipeline, it grants *any* applicant a limited grant of authority to take and acquire an easement in any property or interest in property for the construction, maintenance, or operation of a CO_2 pipeline upon the mere application for a certificate of authority, regardless of the merits of the application.

Nevertheless, "[t]he purpose of condemnation proceedings is to satisfy constitutional and statutory requirements that property may not be taken without due process of law." (*Illinois Cities Water Co. v. City of Mt. Vernon*, 11 Ill. 2d 547, 551 (1957).) Moreover, "[t]he right of eminent domain can only be exercised where such grant [of authority] is specifically conferred by legislative enactment, and then only in the manner and by the agency so empowered." (*Forest Preserve Dist. v. City of Chicago*, 159 Ill. App. 3d 859, 861 (1987).) Pursuant to the CO_2 Act, the Legislature only granted

"a limited grant of authority to take and acquire an easement in any property or interest in property for the construction, maintenance, or operation of a carbon dioxide pipeline in the manner provided for the exercise of the power of eminent domain under the Eminent Domain Act" when a certificate of authority to construct and operate a carbon dioxide pipeline has been issued by the Commission to a person or entity. 220 ILCS 75/20(i). As discussed above, the Commission cannot issue a certificate of authority to operate a carbon dioxide pipeline until, among other things, all legal qualifications to construct and operate the proposed carbon dioxide pipeline are met by the applicant. 220 ILCS 75/20(b)(7). The PO interpretation of the statute is not "illogical" merely because FutureGen is prevented from prematurely exercising eminent domain authority. Rather, FutureGen's interpretation is illogical and contrary to the constitutional property right protections granted to Illinois landowners.

B. The Plain Meaning of the CO_2 Act is Clear, and the Commission should not Consider the Legislative History of the CO_2 Act

FutureGen attempts to look to the Legislative history of the CO_2 Act to argue against the PO conclusion. (FutureGen BOE at 9-11.) However, the plain meaning of the CO_2 Act is clear, and if the plain meaning of the statute is clear, the Commission may not consider the Legislative history – an extrinsic aid to construction - in interpreting the statute. (*People v. Glisson*, 202 Ill. 2d 499, 505 (2002) ("Only where the language of the statute is ambiguous may the court resort to other aids of statutory construction."); *Paciga v. Property Tax Appeal Bd.*, 322 Ill. App. 3d 157, 161 (2001) ("A statute is ambiguous if it is capable of two *reasonable* and conflicting interpretations.") (emphasis added).)

Importantly, the CO_2 Act allows for only one reasonable interpretation on this issue. As discussed above, FutureGen's interpretation is unreasonable. (*See, generally,* FutureGen BOE.) It would render the Commission certification process, the certificate of authority itself, and the entire CO_2 Act meaningless. "Where the language of a statute admits of two constructions, one of which would make the enactment absurd and illogical, while the other renders it reasonable and sensible, the construction which leads to an absurd result must be avoided." (*Mulligan v. Joliet Regional Port District*, 527 N.E.2d 1264, 1269 (1988).) The result of FutureGen's position is unreasonable and the results it would allow are absurd and illogical, and thus, FutureGen's statutory interpretation should be avoided.

C. FutureGen's request that the Commission Exercise its Discretion to Adopt FutureGen's Interpretation should be Ignored

FutureGen acknowledges the long-standing deference to the Commission observed by the Illinois Supreme Court "as being the judgment of a tribunal appointed by law and informed by experience." (FutureGen BOE at 11 (*citing Iowa-Ill. Gas & Elec. Co. v. Ill. Commerce Comm'n*, 19 Ill. 2d 436, 432, 167 N.E.2d 414 (1960).) Certainly, the Commission deserves and enjoys this deference to its decisions.

However, FutureGen errs in suggesting "[t]here is simply nothing in the Act's language, purpose, history or policy to prohibit the Commission from interpreting the Act in the way advocated by the FutureGen Alliance." (FutureGen BOE at 12.)

First, FutureGen points to the legislative purpose section of the CO_2 Act as the only support for its argument that it should be given eminent domain authority pursuant to the CO_2 Act (to avoid discouraging development) without any consideration of the potentially affected property owners and their rights to due process of law. *Id.*; (*see*

Iowa-Ill. Gas & Elec. Co. v. Ill. Commerce Comm'n, 19 Ill. 2d at 432 ("The purpose of condemnation proceedings is to satisfy constitutional and statutory requirements that property may not be taken without due process of law."); *Forest Preserve Dist. v. City of Chicago*, 159 Ill. App. 3d 859, 861 (1987) ("The right of eminent domain can only be exercised where such grant [of authority] is specifically conferred by legislative enactment, and then only in the manner and by the agency so empowered.").)

As discussed thoroughly above, the PO recognizes that the plain meaning of the CO_2 Act requires adoption of Staff's construction, and further recognizes that the language suggested by FutureGen is contrary to that plain meaning. The Commission should adopt the PO's reasoning and decision.

Second, the Commission should also ignore FutureGen's request that the Commission ignore the requirements of the CO_2 Act and instead follow the unrelated and entirely irrelevant FERC procedures governing an entirely different process. (FutureGen BOE at 12-13.) How FERC handles granting of certificates for public convenience and necessity is completely irrelevant to how the CO_2 Act, an Illinois statute, requires the Commission to handle the granting of a certificate of authority pursuant to the CO_2 Act. FutureGen cannot, and does not, raise any issue of federal preemption here. Any reference to the FERC process should be ignored as irrelevant. (*See* FutureGen BOE at 12-13.)

Third, FutureGen errs in asserting that the PO is impractical and "unworkable because it would deny the FutureGen Alliance the ability to begin the condemnation process in the courts until after the last permit was finalized." (FutureGen BOE at 13, 14.) However, the PO is not "unworkable" merely because it prevents FutureGen from

exercising eminent domain before it obtains an effective certificate of authority. FutureGen does not, for example, explain why it should be allowed to exercise eminent domain before it has obtained permits which it might conceivably never obtain. Additionally, the PO is not "impractical" merely because of FutureGen's unique project funding issues. Allowing FutureGen's singular financial situation to affect the Commission's interpretation of the CO_2 Act requirements would be the practical equivalent of special legislation, which is prohibited in Illinois. ILCS Const. Art. 4, § 13 ("The General Assembly shall pass no special or local law when a general law is or can be made applicable.") The CO_2 Act provides for the issuance of a certificate of authority once certain practical requirements are met, and one applicant's alleged funding problems are not indicative of the practicality of the PO's interpretation of the CO_2 Act.

Moreover, the CO_2 Act states:

> [a] certificate of authority to construct and operate a carbon dioxide pipeline issued by the Commission shall contain and include . . . a limited grant of authority to take and acquire an easement in any property or interest in property for the construction, maintenance, or operation of a carbon dioxide pipeline in the manner provided for the exercise of the power of eminent domain under the Eminent Domain Act.

220 ILCS 75/20(i). Clearly, this authority is granted when a certificate of authority becomes effective and in force pursuant to the CO_2 Act. *See id.* It would be illogical for the General Assembly or the Commission to allow an applicant this authority without having met all the requirements to obtain the certificate of authority pursuant to the CO_2 Act. Moreover, doing so would essentially be equivalent to the Commission rewriting the statute to remedy FutureGen's perceived "defect" applicable to only FutureGen. This should not be done.

Fourth, FutureGen errs in asserting that under its interpretation, FutureGen could not start construction on any property before the certificate of authority had been obtained, and therefore, landowner rights would be protected. (FutureGen BOE at 15.) This ignores the very real infringements on property owners' rights that accompany any exercise of eminent domain authority. As the PO correctly points out, "in either event, the property owner would be deprived of his or her property rights." (PO at 17.) The exercise of eminent domain authority pursuant to the CO_2 Act should only be authorized by the Commission after an applicant has obtained all required permits and approvals.

Fifth, FutureGen errs in asserting that honoring landowner's property and due process rights somehow results in "unreasonable" delays. (FutureGen BOE at 15.) Successful applicants under the CO_2 Act will receive "a limited grant of authority to take and acquire an easement in any property or interest in property . . . in a manner provided for the exercise of the power of eminent domain under the Eminent Domain Act." 220 ILCS 75/20(i)(2). As discussed above, "[t]he purpose of condemnation proceedings is to satisfy constitutional and statutory requirements that property may not be taken without due process of law." *Iowa-Ill. Gas & Elec. Co. v. Ill. Commerce Comm'n*, 19 Ill. 2d at 432. Due process of law is required as part of the process of the exercise of the power of eminent domain under the Eminent Domain Act, and is therefore required as part of the process of the limited grant of authority given to successful applicants under the CO_2 Act. Following the procedures that ensure property owners' due process rights are not violated may result in "delays" for FutureGen, but certainly is not unreasonable.

II. Conclusion

WHEREFORE, for all the reasons discussed above, Staff respectfully requests that the Commission confirm the PO as written by the ALJ.

Respectfully submitted,
__/s/_____
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